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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45155
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-16-30505
v.)	
)	
MARK NELSON ANDERSON,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
<hr/>)	

STATEMENT OF THE CASE

Nature of the Case

Mark Nelson Anderson appeals from the district court's Judgment of Conviction and Order of Commitment. Mr. Anderson was sentenced to a unified sentence of ten years, with three years fixed, for his possession of a controlled substance with the intent to deliver conviction. He asserts that the district court abused its discretion in sentencing him to an excessive sentence without properly considering the mitigating factors that exist in this case.

Statement of the Facts & Course of Proceedings

On October 4, 2016, an Information was filed charging Mr. Anderson with two counts of possession of a controlled substance with the intent to deliver and one count of manufacturing

drug paraphernalia with the intent to deliver. (R., pp.36-37.) The charges were the result of a search conducted by probation and parole. (PSI, p.4.)¹ Mr. Anderson admitted to officers that he had been selling and using methamphetamine. (PSI, p.4.)

Mr. Anderson entered a guilty plea to one count of possession of a controlled substance with the intent to deliver and the remaining charges were dismissed pursuant to the plea agreement. (R., pp.67, 85.) At the sentencing, the prosecution recommended the imposition of a unified sentence of 15 years, with 3 ½ years fixed. (Tr., p.26, L.21 – p.27, L.3.) Defense counsel requested a unified sentence of seven years, with one year fixed. (Tr., p.31, Ls.5-7.) The district court imposed a unified sentence of ten years, with three years fixed. (R., pp.85-86.) Mr. Anderson filed a Notice of Appeal timely from the Judgment of Conviction and Order of Commitment. (R., pp.90-92.)

ISSUE

Did the district court abuse its discretion when it imposed, upon Mr. Anderson, a unified sentence of ten years, with three years fixed, following his plea of guilty to possession of a controlled substance with the intent to deliver?

ARGUMENT

The District Court Abused Its Discretion When It Imposed, Upon Mr. Anderson, A Unified Sentence Of Ten Years, With Three Years Fixed, Following His Plea Of Guilty To Possession Of A Controlled Substance With The Intent To Deliver

Mr. Anderson asserts that, given any view of the facts, his unified sentence of ten years, with three years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review

¹ For ease of reference, the electronic file containing the Presentence Investigation Report and attachments will be cited as “PSI” and referenced pages will correspond with the electronic page numbers contained in this file.

of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Anderson does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Anderson must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978), *overruled on other grounds by State v. Coassolo*, 136 Idaho 138 (2001)).

Appellate courts use a three-part test for determining whether a district court abused its discretion: (1) whether the court correctly perceived that the issue was one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether it reached its decision by an exercise of reason. *State v. Stevens*, 146 Idaho 139, 143 (2008) (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991)).

Mr. Anderson asserts that the district court failed to give proper weight and consideration to the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason. Specifically, he asserts that the district court failed to give proper

consideration to his admitted substance abuse problem and desire for treatment. Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982).

Mr. Anderson began using alcohol at the age of 11, marijuana at the age of 15, hallucinogens and prescription drugs at the age of 16, inhalants at the age of 17, cocaine at the age of 19, methamphetamines at the age of 20, and heroin at the age of 30. (PSI, pp.18-19.) He has been involved in treatment previously, but has been unsuccessful at beating his nearly life-long addiction. (PSI, p.20.) He has been diagnosed with Alcohol Use Disorder, Severe – In a Controlled Environment; Stimulant Use Disorder – Amphetamine Type, Severe – In a Controlled Environment; and Opioid Use Disorder, Severe – In a Controlled Environment. (PSI, pp.28, 42, 355-56.) Mr. Anderson reports that he is about 100% ready to remain abstinent (PSI, p.34.) In order to reach his goal of abstinence, it was recommended that Mr. Anderson participate in Level II.1 Intensive Outpatient Treatment. (PSI, p.40.)

Idaho courts have previously recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581, 976 P.2d 927, 935 (1999). Mr. Anderson has been previously diagnosed with depression. (PSI, p.17.) He has been suffering from depression since 1975 and, at the time the PSI was completed, was taking Celexa to ease his symptoms. (PSI, p.18.) In recent evaluations, he was also diagnosed with Major Depressive Disorder, moderate, concurrent and Other Specified Anxiety Disorder. (PSI, pp.28, 42, 356.) It was recommended that he continue psychotropic treatment and noted that he may benefit from individual counseling. (PSI, pp.44, 357.)

In *State v. James*, 112 Idaho 239, 243-44 (Ct. App. 1986), the Court of Appeals held that the health problems of the defendant are a factor for the district court to consider in evaluating a sentence. Mr. Anderson suffers from very serious health concerns. He has been diagnosed with Stage 4 Liver Disease, Hepatitis C, and emphysema. (PSI, p.18.) At the time the PSI was completed, he was taking Albuterol for his emphysema. (PSI, p.18.)

Furthermore, in *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. *Id.* Mr. Anderson has the support of his wife Judith. (PSI, p.347.) Mrs. Anderson noted that her husband is "a good person with a lot to offer the community and his family." (PSI, p.347.) She requested that he be provided with an opportunity to complete treatment so that he finally achieve long term sobriety. (PSI, p.347.)

Additionally, Mr. Anderson has expressed his remorse for committing the instant offense. In *State v. Alberts*, 121 Idaho 204, 824 P.2d 135 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, "In light of Alberts' expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character." *Id.* 121 Idaho at 209, 824 P.2d at 209. In the PSI, Mr. Anderson noted that:

I have struggled with addiction all my life. I have also been prone to great bouts of depression whether brought on by self-pity, trauma, or my chemical make-up (imbalance). I had quit taking my anti-depressants before my step-mother had passed and thought I handled her death well although I had begun to drink, obviously self-medicating again.

Do I expect more out of my anti-depressants because I don't feel well or good-yes I do, maybe I am not on the right ones. What I did was unlawful, I accept responsibility for that. Prison is not the solution to everything and I feel that addressing my mental health issues and applying addition recovering would have more positive results.

(PSI, p.22.) At the sentencing hearing, he told the district court, “I do want to address my issues. I take full responsibility for what I did.” (Tr., p.32, Ls.17-18.) “What I did was wrong. . . . I am deeply remorseful . . .” (Tr., p.35, Ls.15-24.)

Based upon the above mitigating factors, Mr. Anderson asserts that the district court abused its discretion by imposing an excessive sentence upon him. He asserts that had the district court properly considered his substance abuse, desire for continued treatment, mental health issues, health problems, family support, and remorse, it would have crafted a less severe sentence that focused on his further rehabilitation rather than incarceration.

CONCLUSION

Mr. Anderson respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 6th day of November, 2017.

_____/s/_____
ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

MARK NELSON ANDERSON
INMATE #39183
ISCI
PO BOX 14
BOISE ID 83707

DEBORAH A BAIL
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

EAA/eas